88-1435

Supreme Court, U.S.
FILED
MAR 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.: _____

IN THE

Supreme Court of the United States

October Term, 1988

CHANDLER'S COVE INN, LTD.,
Petitioner,

-against-

CEDAR TIDE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY W. MINTZ
Attorney for Petitioner
Chandler's Cove Inn, Ltd.
295 Madison Avenue
New York, New York 10017
(212) 532-9131

53pp

QUESTIONS PRESENTED

1. Whether or not a corporation dissolved by proclamation under the laws of the State of its incorporation may seek protection and re-organization under Chapter 11 of the United States Bankruptcy Code where such an exercise of authority exceeds the limited franchise granted under the laws of that State?

2. Whether or not summary judgment may properly be granted under Rule 56 of the Federal Rules of Civil Procedure where the record is unclear, the moving papers are deficient and triable issues of fact are in dispute?

PARTIES

The debtor, plaintiff and appellee in the Courts below was Cedar Tide Corporation. The defendant-appellant in the Courts below was Chandler's Cove Inn, Ltd.

TABLE OF CONTENTS PAGE

QUESTIONS PRESENTED i

PARTIES i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT. 10

CONCLUSION 20

TABLE OF AUTHORITIES **PAGE**

CASES

Anderson v. Liberty Lobby,
477 U.S. 242 (1986) 19

Celotex Corporation v. Cattrett,
477 U.S. 317 (1986) 19

Halperin et al. v. Kissinger et al.,
807 F.2d 180 (D.C. Cir. 1986) 18

In Re Martin Trigona,
760 F.2d 1334 (2d Cir) 11, 14

Lorisa Captial Corp. v. Gallo,
119 A.D.2d 99 (N.Y.A.D.2d Dept. 1986) 14, 18

Matter of Lewis v. Schwartz,
119 A.D.2d 116 (N.Y.A.D.1st Dept. 1986) 15, 16

172 East 122 Street Tenants
Association et al. v. Schwartz,
136 A.D.2d 370 (N.Y.A.D.1st Dept. 1988) 16

(continued on next page)

STATUTES

Chapter 11 of the United States Bankruptcy Code i, 4, 11

11 U.S.C. Section 363 5, 13

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 2101(c) 1, 2, 18, 19

New York Tax Law Section 203(a) 14, 15

N.Y. Business Corporation Law Section 1005(a) 3

COURT RULES

Bankruptcy Rule 7015 6

Bank R. 7056, ... 2

Fed. R. Civ. P. 15 6

Rule 56 of the Federal Rules of Civil Procedure 1, 2, 18, 19

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CHANDLER'S COVE INN, LTD.,

Petitioner

-against-

CEDAR TIDE CORPORATION,

Respondent

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHANDLER'S COVE INN, LTD. (CCI) petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (Court of Appeals) to review the decision of that Court rendered October 17, 1988. A petition for rehearing *en banc* filed on behalf of CCI was

denied by the Court of Appeals on December 1, 1988. The Court of Appeals affirmed an order of the United States District Court, Eastern District of New York (Weinstein, J.), which upheld a judgment of the United States Bankruptcy Court rendered October 16, 1986. The Bankruptcy Court granted Cedar Tide Corp. (CTC) summary judgment setting aside a deed transferring real property from Cedar Tide Corp. to CCI.

OPINIONS BELOW

On October 17, 1988, the Court of Appeals rendered an opinion affirming the order of the United States District Court (Appendix A, infra, A1-A-24). No other opinions were made below.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion of the Court of Appeals, made and entered on October 17, 1988. A timely filed petition for rehearing *en banc* was denied on December 1, 1988. The present petition is timely filed within ninety days of that date, in accordance with 28 U.S.C. Section 2101 (c).

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. Rule 56 of the Federal Rules of Civil Procedure, incorporated by reference in Bank R. 7056, provides in pertinent part:

"(c)... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."

2. New York Business Corporation Law Section 1005 (a) provides in pertinent part that:

"After dissolution: (1) The corporation shall carry on no business except for the purpose of winding up its affairs. (2) The corporation shall proceed to wind up its affairs, with power to fulfill or discharge its contracts, collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business."

STATEMENT OF THE CASE

Respondent CEDAR TIDE CORP. (hereinafter CEDAR TIDE) filed an adversary proceeding on May 23, 1986 asking the United States Bankruptcy Court, Eastern District of New York, to set aside a certain deed transferring improved (with residential structures requiring major repairs) real property located at Mt. Sinai, New York to CCI (J.A. 1-8).[1] CCI moved, by motion returnable on July 12, 1986 (JA. 9-81), to dismiss the adversary proceeding and the bankruptcy petition on the grounds, inter alia, that plaintiff was a dissolved corporation and a non-entity for a period of some six years, up to and including the date upon which the purported Chapter 11 bankruptcy petition was filed (JA. 24-25). Additionally, Cedar Tide Corp. was not an operating business at the time of said filing on December 10, 1985.

CCI objected to the standing of movant to prosecute the adversary proceeding and sought dismissal on that basis. Those purporting to exercise dominion and control over the filing of the CEDAR TIDE petition on December 10, 1985, were unable thereafter to determine amongst themselves, who, if any of them, owned any of the stock of the defunct corporation, despite numerous sworn statements placed before the Court by CEDAR TIDE's counsel, that either ELIZABETH CHANDLER owned 62.5% of the issued

---

1. Page references refer to pagination in Joint Appendix filed in the Court of Appeals.

shares and FRED CHANDLER owned 37.5% of the issued shares (JA. 29), or that ELIZABETH CHANDLER owned 100% of the issued stock and FRED CHANDLER owned no shares, (JA. 68) or that ELIZABETH CHANDLER owned 50% of the issued shares and FRED CHANDLER owned 50% of the issued shares (JA. 136-137) or that there was some question as to whether or not FRED CHANDLER owned any of the stock in CEDAR TIDE CORP. (Brief of Appellee, before the United States District Court) at the time that the purported petition was filed on December 10, 1985. [2] The aforementioned sworn statements are on the record and controvert the sworn declaration made by Frederick Chandler and Elizabeth Chandler JA. 136-137), upon which the CEDAR TIDE bankruptcy filing was predicated. Contrary to the confusion demonstrated by ELIZABETH CHANDLER and FRED CHANDLER as regards the ownership of the CEDAR TIDE CORP. stock, CCI demonstrated with certainty that it and its principals owned and controlled 75% of the stock in question (JA. 12-14, 129-132). The record is devoid of any showing by competent evidence that the purported principals of CEDAR TIDE CORP., ELIZABETH CHANDLER and/or FRED CHANDLER owned any of the stock of CEDAR TIDE CORP., on December 10, 1985 at the time that the purported petition under Chapter 11 of the United States Bankruptcy Code was filed.

The Bankruptcy Court denied the motion to dismiss (J.A. 86). At oral argument held on June 4, 1986, the Bankruptcy Court (Goetz, J.) found that the authorities are fairly clear that a defunct corporation may reorganize under Chapter 11 of the United States Bankruptcy Code (Transcript of June 4, 1986). By Docket Entry made on February 24, 1986, some three months after the purported Cedar Tide Corp. filing, and some four months before the learned Judge Goetz made her determination as above, the Estate Administrator

---

2. The United States Court of Appeals ackowledged in its opinion that Cedar Tide's stock may never have been issued (A 4) and that conflicting assertions were made as to the stock ownership in CEDAR TIDE CORP (A. 7).

wrote a letter to Cedar Tide's counsel suggesting that the debtor submit an application and order for the amendment of the caption to reflect a D/B/A (JA. 64). Thereafter, by docket entry made on April 2, 1986, some two months prior to the time that the Learned Judge Goetz made her determination as above, the Court directed the Estate Administrator to investigate the filing in view of Paragraph 7 of Cedar Tide's counsel's affirmation (JA. 64). The affirmation of Cedar Tide's counsel recited that: "Principals of the corporation [Cedar Tide] did not reveal this information before the filing of its petition in bankruptcy. As a result, it is my belief that the corporation's bankruptcy petition is subject to annulment because at the time the petition was made, the corporation had been dissolved by proclamation of the State of New York" (JA. 61).[3] The record is devoid of any indication that CEDAR TIDE CORP. was reinstated at any time up to and including December 10, 1985, a fact which is admitted in CEDAR TIDE's answer to CCI's counterclaim (JA. 114, Para 1). Further, the record is devoid of any indication that the Estate Administrator at any time conducted the investigation ordered by the Honorable Judge Goetz or provided any support for the maintenance of the Cedar Tide bankruptcy case before the Court after Cedar Tide's attorney notified the Court that the filing was fatally flawed.

Issue was joined by the service and filing of CCI's answer on June 16, 1986, which answer, inter alia, alleged that CEDAR TIDE's petition in bankruptcy was filed in bad faith, averred that the provisions of 11 U.S.C. { 363 were inapplicable and denied that the property transferred was property of the Estate, due to debtor's dissolution as a corporate entity in December, 1979 and its continued lack of existence up to and including December 10, 1985 (the date that the purported petition in Bankruptcy was filed) (Defendant's Answer).

---

3. The Court of Appeals noted in its opinion that Cedar Tide was dissolved by proclamation of the Secretary of State of New York in the year 1979 for non-payment of franchise taxes (A. 4)

CCI filed an amended answer and counterclaim (JA. 88-104) against plaintiff Cedar Tide Corp. and Fred Chandler on July 7, 1986 within the time allowed for amendments as of right. The amended answer and counterclaim sought money damages and contained a demand for a jury trial (JA. 98).

CEDAR TIDE sought a judgment setting aside a certain deed transferring improved real property to CCI on the grounds that the property was part of the claimed Bankrupt estate of CEDAR TIDE and that the transfer was unauthorized by Cedar Tide, or the Bankruptcy Court. CCI interposed a counterclaim (JA. 88-106) within the time granted under Fed. R. Civ. P. 15, incorporated by reference in Bankruptcy Rule 7015, alleging inter alia that Fred Chandler, acting in his individual capacity and as a purported agent for Cedar Tide, knew that Cedar Tide Corp. was a non-entity and acted in bad faith when the alleged petition in bankruptcy was filed. Additionally, CCI alleged that Fred Chandler knowingly made false statements to CCI that he would withdraw as defective Cedar Tide's alleged bankruptcy petition. The counterclaim further alleges, inter alia, that in reliance on these representations and others, CCI entered into complex and costly financial arrangements and negotiations in order to cooperate with Cedar Tide and its principals. Accordingly, CCI, as the successor corporation to the defunct CEDAR TIDE (JA. 143, 147) undertook to pay Cedar Tide's just debts and obligations, including secured creditor THE MINT FACTORS, to prevent the MINT FACTORS from evicting ELIZABETH CHANDLER from mortgaged premises upon which a foreclosure judgment had been obtained, to provide for ELIZABETH CHANDLER'S future security by providing her with a reliable and steady flow of income as well as a lump sum payment, and to provide for FRED CHANDLER'S future security by providing an annual income for him, as well as a share of the proceeds of CCI 's operations (JA. 147). It should be noted that when the adversary proceeding was commenced in the Bankruptcy Court, CEDAR TIDE'S counsel, certified that he notified CCI of the pendency of the Order to Show Cause, seeking a restraining order against it, by noticing FRED CHANDLER, the individual listed as the agent for service in CCI's Certificate of Incorporation (JA. 79) and the same individual who brought the CEDAR TIDE

petition before the Bankruptcy Court on December 10, 1985.

The main claim sought to avoid the transfer of property while the counterclaim sought the recovery for expenses incurred and obligations undertaken in connection with the negotiations leading up to the transfer of a certain deed from a defunct corporation (CEDAR TIDE) to its successor in interest (CCI), consistent with the limited franchise granted to a corporation dissolved by proclamation under New York State law. The claim implicitly asserts the validity of the filing of the alleged bankruptcy petition and the creation of the Bankrupt Estate while the counterclaim takes the opposite position.

The Bankruptcy Court accepted the counterclaim against CEDAR TIDE for filing but characterized the claim against Fred Chandler as a third party complaint and refused to issue a summons bringing in Fred Chandler until leave was granted to do so upon motion with notice to all parties (J.A. 104-106). CCI subsequently made a motion seeking leave to join Fred Chandler as an additional defendant in the counterclaim on July 17, 1986 (J.A. 107-113). The return date was posponed until September 30, 1986, the same date that CEDAR TIDE's motion for summary judgment was heard. The Court heard the motion for summary judgment but never made a determination on the motion to join Frederick Chandler as an additional defendant on counterclaim.

Plaintiff CEDAR TIDE filed a motion for summary judgment on September 9, 1986, returnable on September 30, 1986. The motion was supported solely by an unverified petition signed by CEDAR TIDE's counsel, and the unverified pleadings in the action. No allegation or a showing was made as to the competence of the moving papers signed by CEDAR TIDE's counsel. In the moving papers, counsel suggested that summary judgment would properly be granted in favor of movant because the non-moving party could not demonstrate that triable issues of fact were in dispute. The moving papers alleged in conclusory fashion that the defenses set forth by CCI in its answer and counterclaim were merely a "smoke screen". CCI filed two affidavits in opposition to plaintiff's motion on September 29, 1986 . (J.A. 123-155). The Court granted plaintiff's motion for summary judgment and denied

defendant's demand for a jury trial on the counterclaim. A final judgment was entered on October 16, 1986. (J.A. 156, 157).

On or about October 25, 1986, CCI's attorney of record in the adversary proceeding, DOUGLAS A. DURNIN, with offices in Nassau County, New York, filed a notice of appeal to the United States District Court, Eastern District of New York. Thereafter, he filed a designation of the record on appeal. At that time, CCI's attorney DOUGLAS DURNIN was unaware that CCI had retained independent counsel located in New York City, New York and that on September 26, 1986, CCI filed a voluntary Chapter 7 Bankruptcy petition, in the Southern District of New York, where its principal place of business had been located for the 180 days immediately proceeding the filing of the petition in Bankruptcy (JA. 168-171). CCI's counsel DOUGLAS DURNIN, acting in good faith, perfected the appeal before District Court in March of 1987. A 45 day adjournment of the date set for argument on the appeal was obtained from the District Court by CCI's Chapter 7 trustee ROBERT PRYOR (letter from Robert L. Pryor to Judge Weinstein). Prior to the expiration of the 45 day time period, CCI's bankruptcy proceeding was converted to a case under Chapter 11 of the United States Bankruptcy Code and the interim trustee was discharged upon conversion (Id.). On July 15, 1987 the appeal was heard before the District Court, which held that only CCI's Chapter 7 Bankruptcy trustee was empowered by statute to pursue the appeal and that the Court lacked jurisdiction over the appeal brought by CCI and that dismissal was required, on procedural/jurisdictional grounds. The Court further held that it was dismissing the appeal on the merits. A final order purporting to dismiss the appeal on procedural /jurisdictional grounds and to dismiss the appeal on the merits, was entered on August 6, 1987 (JA. 158-159).

CCI appealed the District Court's order to the United States Court of Appeals for the Second Circuit as of right. The Court of Appeals affirmed the District Court's order on the merits although it did not agree with the District Court's finding that jurisdiction over the appeal was lacking. The Court ackowledged that the record was unclear and that it was

difficult to piece together a coherent tale from the record. (A. 3). However, the Court of Appeals opined that it could dispose of the issue of whether the appeal was properly before the United States District Court and whether summary judgment was properly granted, based upon the record before it. The Court of Appeals determined that the appeal was properly before the District Court and that on the merits, the District Court properly affirmed the Bankruptcy Court's judgment setting aside the transfer of property from CEDAR TIDE to CCI. The Court of Appeals disagreed with CCI's contention that the property transferred was not vested as property of a bankrupt estate based upon CEDAR TIDE's filing of a Chapter 11 petition seeking reorganization at a time that it was a dissolved corporation, entitled under New York law to take no action except to wind up its affairs (A. 16). The Court of Appeals held that a dissolved corporation is an entity which may seek reorganization under Chapter 11 of the United States Bankruptcy Code, although it noted that there is no case law which clearly disposes of the issue (A. 17). A separate motion by CCI asking the Court to certify the question to the New York State Court of Appeals was denied.

CCI filed a motion for rehearing *en banc* before the Court of Appeals. In the motion for rehearing, CCI cited reported decisions in the State of New York uniformly striking down any action on the part of a corporation dissolved for non-payment of franchise taxes, inconsistent with the limited franchise granted to the corporation to wind up its affairs. CCI again requested that the issue be certified to the New York State Court of Appeals for its determination on the important issue under New York State Law. An examination of the decisions rendered by the Courts in the State of New York have strictly applied the restrictions on dissolved corporation to those consistent with winding up its affairs, while the Court of Appeals in this case has interpreted New York state law to allow a corporation dissolved for non-payment of franchise taxes to re-organize under Chapter 11 of the United States Bankruptcy Code. On December 1, 1988, the Court of Appeals denied CCI's petition for rehearing *en banc* without opinion (A. 25-26).

REASONS FOR GRANTING THE WRIT

CCI submits that the Petition for a Writ of Certiorari should be granted in this case because the decision of the Court of Appeals below is completely at odds with all reported decisions of the New York State appellate Courts construing the rights and remedies of a corporation dissolved for non-payment of franchise taxes. As state law determines the rights and authority of a corporate debtor Price v. Gurney, 324 U.S. 100, 106, an examination of the laws of State of incorporation are controlling. The determination of this issue in the present case implicates important issues of federalism as it involves circumstances where a corporation dissolved by virtue of the laws of the State which created it for failure to pay franchise taxes due and owing, has been given "new life" by the Second Circuit, which recognized the right and ability of the defunct corporation to re-organize in the face of its failure to pay New York State franchise taxes for a nine year time period.

The Court of Appeals found that the record on appeal contained serious lacunae involving grave improprieties and an extraordinary number of unresolved contradictions, apparent obfuscations and unanswered allegations of fraud amounting to criminal conduct. CCI charged that its Chapter 7 Bankruptcy trustee Robert Pryor (Pryor) had an undisclosed attorney-client relationship with CEDAR TIDE CORP.'s (CTC's) counsel PINKS, BROOKS, STERN & ARBEIT (PINKS) that was ongoing during the proceedings before the Bankruptcy Court. Further CCI alleged that PRYOR and PINKS failed to disclose their close relationship to the Court and engaged in multiple acts of bankruptcy fraud. The Court of Appeals directed that a copy of its decision be served upon the United States Attorney so that the unresolved allegations of criminal conduct could be reviewed to determine what action, if any, might appropriately be taken. The Judge who appointed PRYOR as trustee thereafter recused herself from all cases involving CCI and CTC.

The Court of Appeals decision concentrated upon whether CCI's appeal was properly before the District Court, which dismissed the appeal on procedural/jurisdictional grounds and affirmed the appeal on the merits and also focused upon the

issue of whether CTC, a defunct entity under New York law, was empowered to seek reorganization under Chapter 11 of the United States Bankruptcy Code. The Court of Appeals, relying upon the case of In Re Martin Trigona, 760 F.2d 1334, construing the powers of a defunct corporation under Connecticut law, found it unnecessary to certify to the Court of Appeals of the State of New York the issue of whether a New York corporation would have such rights and remedies under the law of the State of New York.

The Court of Appeals held that CTC, a corporation which was dissolved by proclamation of the Secretary of State of New York and whose charter was forfeited under New York law, had the right to reorganize under Chapter 11 of the United States Bankruptcy Code, prior to the time that it paid franchise taxes due to the State of New York. Further, the Court of Appeals held that a challenge to the Chapter 11 filing of CTC on December 10, 1985 could not be raised as an affirmative defense to the avoidance of a transfer of Estate property (on March 24, 1986). CCI respectfully submits that the transferred property was not Estate property on December 10, 1985 or on March 24, 1986 and that the filing of the purported petition, in excess of the limited charter granted to a defunct corporation to wind up its affairs, was a nullity. CCI maintains that the CTC bankruptcy filing, based upon the sworn declaration of Fred Chandler, who asserted that he was a stockholder and officer of the corporation, was intended by him to be a fraud upon the Court, upon the creditors, upon the tenants of the real property at issue in this case and upon others, including but not limited to the principals of CCI and that those who purported to file the Bankruptcy Petition on December 10, 1985 had no authority from the Board of Directors of the corporation. The supplemental appendix annexed to the reply brief submitted on behalf of CCI in the Court of Appeals contains an affidavit of ELIZABETH CHANDLER, a purported principal of CTC, where she acknowledges that Paul Scott (Scott) (the Chairman of the Board of CCI) was in control of CTC and the property prior to the filing of the petition in bankruptcy. No assertion is made by what lawful means Scott was taken out of control. CCI further submits that where, as here, the record is insufficient to prevent adequate appellate review due to the summary

disposition of the action in the Bankruptcy Court, that the order appealed from be reversed and the matter remitted so that a full evidentiary hearing can be held on the issue of fraud in the filing of the CTC bankruptcy petition, the lack of corporate authority to file the petition and the issue of whether CTC was merely a non-operating shell which did not observe the formalities of a corporate existence. Additionally, CCI submits that in light of the grave improprieties presented here, a challenge to the Chapter 11 filing of CTC by CCI should be held to be available, especially in light of CCI's good faith claim that the bankruptcy was filed for the purpose of defrauding its principals. CCI asserts that if the Court of Appeals decision to preclude it from challenging the validity of the bankruptcy filing, while allowing CTC to assert the validity of the filing as the basis for relief, constitutes a deprivation of property without Due Process of Law and a violation of its rights to equal protection of the laws.

It is respectfully submitted that the Bankruptcy Court, a Court of equity, should never be a haven for lawbreakers and should not be used to advance dilatory legal tactics where human life is at risk. To date, some three years after CTC's purported filing under Chapter 11, no rehabilitation plan has been submitted by CTC. A young woman died on the property at issue in this case in 1986, while it was under the protection of the Bankruptcy Court. The woman died due to the hazardous conditions existing on the properly and nothing has been done to date to relocate the remaining tenancy or to rehabilitate the dangerous structures used as multiple dwellings or the unpaved roads which provide insufficient access for emergency vehicles.

The Court of Appeals opined that the process of reorganization could not be evaded by labeling a sale as being "in the ordinary course of business". CCI respectfully submits that the process of winding up a defunct corporation's affairs cannot be evaded by a pretext of reorganization and that under New York law winding up was in the ordinary course of CTC's business.

CTC possessed no franchise to re-organize on March 24, 1986. The transfer from CTC to CCI, its successor

corporation, was not a sale but was a component of the process of winding up its affairs wherein CCI agreed to assume the bond fide obligations of CTC. The transfer of property from CTC to CCI was consistent with the limited powers granted to CTC under New York law.

CCI submits that the seminal issue in this case is whether the subject real property at issue was vested as property of the purported Chapter 11 Bankruptcy Estate of CTC, prior to March 24, 1986. If it is determined that the property did not in fact vest as the purported filing was a nullity and unavailable to a New York corporation whose charter had been forfeited for non-payment of franchise taxes, then the transfer at issue was not an avoidable post-petition transfer as the provisions of 11 U.S.C. 363 are not implicated in non-estate property. This issue was determined in the Bankruptcy Court by granting CTC summary judgment, even though the papers failed to meet the evidentiary burden under Rule 56 (c). The Bankruptcy Court was uninterested in whether CCI or its principals had been defrauded by the Bankruptcy filing, whether those persons coming before the Court on behalf of CTC were guilty of unclean hands and grossly inequitable, fraudulent and criminal conduct or whether those claiming to represent CTC should have been estopped from asserting the validity of the filing when they had acted at all times inconsistently with any reasonable belief as to the validity and pendency of a Chapter 11 bankruptcy case. [4] Petitioner respectfully submits that CTC exceeded its New York franchise on December 10, 1985 when it sought to rehabilitate the corporation under Chapter 11 of the United States Bankruptcy Code without first paying franchise taxes owing to the State of New York and paying the fees required for reinstatement. The Court of Appeals' decision, if allowed to stand, provides the Bankruptcy Court as a safe haven for lawbreakers and for all those defunct corporations seeking to

---

4. The Court of Appeals noted that Cedar Tide Corp. filed an action to set aside the deed in New York State Court while the bankruptcy was pending and no mention was made in the complaint to the alleged bankruptcy or any entitlement to the benefits of the Bankruptcy Code (A. 7)

avoid paying their creditors and seeking to obtain the benefits and protections of the Bankruptcy Code contrary to the clear statutory command under New York law that a defunct entity limit its activities to winding up its affairs. The Court of Appeals decision establishes as precedent that a defunct corporation can continue to transact new business as a Chapter 11 debtor, without paying its franchise taxes to the State of New York, the jurisdiction which created the corporation in the first place. It is respectfully submitted that the Court of Appeals' reliance on the case of In Re Martin Trigona, 760 F.2d 1334, for the proposition that a defunct New York corporation may continue to operate and/or reorganize, is misplaced. Important issues of federalism are implicated in this case and the Court of Appeals decision here is contrary to three decisions of the Supreme Court of the State of New York, Appellate Division. In those three cases, which appear to be the only relevant decisions interpreting Section 203-a of the Tax Law of the State of New York, the powers of a defunct New York corporation have been construed to be extremely limited. It has been held that a subsequent reinstatement of a corporation does not validate an unauthorized act taken while the corporation is a defunct entity.

In Lorisa Capital Corp v. Gallo, 1 1 9 A. D.2d 99 (N.Y A..D..2d Dept. 1986), the Court held that a defunct corporation had no capacity to bring a suit to enforce a contract entered into during the time when it was a defunct entity, dissolved by proclamation of the State of New York. Despite the potential hardship to the dissolved corporation in being stripped of capacity to bring a lawsuit based upon the transaction of business, the Appellate Division concluded that the rule preventing a defunct entity from enforcing a claim based on new business transacted during its dissolution promotes the statutory scheme under New York law and encourages the corporation to pay its taxes. Further, the Court refused to recognize the validity of an estoppel claim to support capacity to sue on the basis that such a rule would subvert the purposes of the tax statute as no incentive for the payment of taxes and reinstatement would remain. (Id. at 112).

CCI submits that the Court of Appeals decision in this matter provides no incentive for New York corporations dissolved by proclamation to pay its franchise taxes and to seek reinstatement. Instead, the decision recognizes the Bankruptcy Court as a safe haven for a creature of the state defunct New York corporation to avoid paying its taxes to the State of New York while shielding itself from its creditors' claims

In Lewis v. Schwartz, 119 A.D.2d 116 (N.Y. A.D. 1st Dept. 1986), a defunct corporation filed an application to redeem real property from the City of New York which obtained title to the property in an in rem tax proceeding. The defunct corporation executed a release application and filed same with the City of New York, in accordance with the requirements of the Administrative Code of the City of New York. The Appellate Division invalidated the filing of the release application as a nullity and found that the reinstatement of the corporation under N.Y Tax Law Section 203-a did not retroactively validate the unauthorized release application made during its period of dissolution.

In the case sub judice, CTC filed a purported Chapter 11 bankruptcy petition seeking reorganization at a time when it was a defunct entity whose charter had been revoked on December 26, 1979. On March 24, 1986, CCI transferred a deed to CTC, a successor corporation formed at the request of Frederick Chandler, the person upon whose authority the purported CTC bankruptcy petition was filed. CTC was not reinstated as a corporation in New York State until May 5, 1988, (Certified copy of the Secretary of State of New York annexed to petition for rehearing in the Court of Appeals) more then thirty days after CCI accepted the deed from CTC in good faith and undertook certain substantial financial obligations in consideration thereof. CCI's maintains that it only accepted the deed from CTC based upon specific assurances from Frederick Chandler that the CTC bankruptcy petition had been withdrawn prior to March 24, 1986. The Court of Appeals decision finds that the reinstatement of the corporation serves to retroactively validate the Chapter 11 bankruptcy filing and to render the property transferred property of a bankrupt Estate. The rationale that the

reinstatement of the corporation retroactively validates an earlier action taken in excess of the limited franchise granted under the Business Corporation Law of the State of New York, places the Court of Appeals decision directly at odds with the holding and rationale of the Lewis Court on the same issue. The Court of Appeals was presented with the opportunity to accord the New York State Court of Appeals with the opportunity to determine this important issue of law but declined to do so.

In 172 East 122 Street Tenants Association et al., v. Schwartz, 136 A.D.2d 370 (N.Y.A.D. 1st Dept. 1988), the Supreme Court of the State of New York, Appellate Division was asked to consider a case remarkably similar to Matter of Lewis v. Schwartz, where the Court held that a dissolved corporation was ineligible to apply for the release of formerly owned property. In the 172 East Street Tenants Association et al., v. Schwartz, the Court reaffirmed its conclusion that such action was unauthorized. The Court observed:

> As we discussed in *Matter of Lewis v. Schwartz*, (supra), a corporation which is dissolved because of a delinquency in paying franchise taxes is not eligible to apply for release of the property because such action would be violative of the proscription in Business Corporation Law Section 1005 (a) (1) that a dissolved corporation "shall carry on no business except for the purpose of winding up its affairs. The permissible activities which constitute the winding up of a dissolved corporation's 'affairs are described with precision in subdivision (a) (2) of the section as follows: 'power to fulfill or discharge its contracts, to collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business." Id. at 373.

Even the dissenting opinion in *172 East 122 Streett Tenants Association* recognized that the application for release of property could be sustained as valid only if such activity

could be construed as falling within the permissible ambit of collecting the corporation's assets incidental to winding up its affairs. Further, the Court recognized that where a corporation had been dormant for a period of five years after its dissolution, it "can hardly be said to have had any affairs to wind up "(1d. at 374). The Court concluded that as the dissolved corporation was ineligible ab initio to apply for the release of its property by virtue of its status as a dissolved corporation, the release of the property and its subsequent transfer to another purchaser was improper.

CCI respectfully contends that under New York law, CTC was ineligible ab initio to file a petition seeking to reorganize its purported business while it was a dissolved corporation and that its application for such relief, contrary to the statutory command under New York law, should be declared a nullity. In the cases cited above, the New York Courts have routinely refused to recognize actions taken by defunct corporations not strictly complying with the requirements of the Business Corporation Law and the Tax Law. The State of New York has a great interest in assuring that its corporations pay their franchise taxes. The Court of Appeals decision here provides a broad panoply of protections to the defunct New York corporation to which it is not entitled. It is submitted that the Courtof Appeals, as a matter of federalism, should not grant any greater standing or authority to a corporate entity than that provided by the State under whose laws the corporation is organized.

The Trigona case relied upon by the Court of Appeals is factually and legally readily distinguishable from the situation here. In Trigona, the person seeking to attack the validity of the corporate filing was the very person who had accepted the benefits of the protection of the Bankruptcy Court, never raising any objection to its jurisdiction until it suited his purpose. One basis supporting the Court's decision there was that Trigona be estopped by his actions from challenging the validity of the bankruptcy where he accepted the benefits thereof. That is not the case here. In the case sub judice, CCI asserts that CTC filed the Chapter 11 petition in bad faith for the purpose of defrauding principals thereof. CCI did not accept the benefits of the protections allegedly afforded

CTC but rather consistently contested the validity of the bankruptcy filing as a sham and a fraud and as an action unauthorized under New York law. The next theory upon which the holding in Trigona was based is that the debtor had held itself out to the world and operated as if it were a valid corporation, thereby rendering it a de facto corporation. In the within case, rather than holding itself out to the world as a valid corporation, the record indicates that with the exception of the claims made below by counsel for CTC as to the activities of CTC, the purported principals transacted business in their own name, commingled personal funds with purported corporate funds and denied to creditors and its tenants alike that CTC was the owner of the subject property. In the Lorisa Capital case, the Court held that according a dissolved corporation capacity to prosecute claims on the theory of estoppel against the other party or on the basis of the theory of a de facto corporation would subvert the purpose of the State statute, which it to induce corporations to pay its taxes to the State of New York.

CCI submits that the petition for a Writ of Certiorari should be granted on the grounds that the Court of Appeals decision is at odds with decisional law of this Court and of other Federal Courts in other circuits construing Rule 56 of the Federal Rules of Civil Procedure to determine whether summary disposition of the proceeding is appropriate. In this case, even though the Court of Appeals acknowledged difficulty in piecing together a coherent tale from the record, acknowledged that the record was unclear and that there were unanswered allegations of fraud amounting to criminal conduct, it held that summary judgment was properly awarded to CEDAR TIDE CORP. granting it equitable relief in the form of a judgment setting aside a transfer of real property by deed. This determination was made by the Court of Appeals despite its acknowledgement that CEDAR TIDE's moving papers did not comply with the requirements of Fed R. Civ P. 56. The Court of Appeals held that based upon the record, the Court was justified in granting summary judgment, even though the moving papers were deficient.

In Halperin et al. v. Kissinger et al., 807 F.2d 180 (D.C. Cir. 1986), the Court, in an opinion delivered by Justice

Scalia, observed that the fact that an objective examination of the record may provide support for the claim asserted does not entitle the movant to summary judgment. The Court of Appeals noted that under Fed R. Civ P. 56 (c), the burden is on the movant to "demonstrate as a condition of summary judgment, that the objective inquiry raises no genuine issue as to any material fact ** A straightforward application of Rule 56(c) **** requires ****that defendants adduce sufficient facts that no reasonable jury, looking at the evidence in a light most favorable to, and drawing all inferences most favorable to the ***[non-moving party], could conclude that it was objectively unreasonable for the defendants to be acting for national security reasons.-Id. at 189.

While this Court has held that summary judgment may be granted upon the failure of the non-moving party to meet its burden of proof Celotex Corporation v. Catrett, 477 U.S. 317, that issue is not implicated in this case as movant CEDAR TIDE bore the burden of proving its allegation that the property transferred was property of the bankrupt Estate. Even assuming that CEDAR TIDE had met such a burden, a triable issue of fact was presented as to whether CEDAR TIDE CORP. and its claimed principals (who could show no actual ownership or stock interest in the corporation) should be estopped or barred by equitable considerations from asserting the validity of the purported bankruptcy proceeding.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), this Court reaffirmed that the movant has the burden of showing that there is no genuine issue of fact, although this does not relieve the non-movant of any burden of production which it may have.

CCI submits that its Petition for a Writ of Certiorari should be granted based upon the significant issues of law presented, involving interests of federalism, the rights and obligations of a corporate entity in the Federal Courts, the restrictions imposed by state law upon corporate activites, and involving the proper application of Fed R. Civ P. 56 to the determination of motions for summary judgment brought by the party bearing the burden of proof and/or production.

CONCLUSION

Petitioner respectfully urges that this Court grant the petition and issue a Writ of Certiorari to the Court of Appeals for the Second Circuit to review the opinion that the Court entered against CCI.

Respectfully submitted,

SIDNEY W. MINTZ
Attorney for petitioner CCI
295 Madison Avenue,
New York, N.Y. 10017
(212) 532-9131

APPENDIX

APPENDIX- TABLE OF CONTENTS PAGE

Opinion of the United States Court of Appeals	A1-A24
Order denying petition for rehearing	A25-A26

(Slip Opinion of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 675-August Term, 1987

(Argued February 4, 1988
Decided October 17, 1988)

Docket No. 87-5035

IN RE: CEDAR TIDE CORPORATION,

Debtor,

CEDAR TIDE CORPORATION,

Plaintiff-Appellee,

CHANDLER'S COVE INN, LTD.,

Defendant-Appellant.

Before:

TIMBERS, WINTER and ALTIMARI,
Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York (Jack B. Weinstein, Chief Judge) dismissing on procedural grounds and on the merits an appeal from an order of the Bankruptcy Court (Cecelia H. Goetz, Bankruptcy Judge), voiding a post-petition transfer of property from a Chapter 11 debtor for failure to obtain court approval for the transfer as required by 11 U.S.C. SS 363(b)(1). We affirm.

CHARLES E. MORRISON, New York, New York, for Defendant-Appellant.

ROBERT S. ARBEIT, Hauppauge, New York (Pinks, Brooks, Stern & Arbeit, Hauppauge, New York, of counsel), for Plaintiff-Appellee-Debtor.

WINTER, Circuit Judge:

The burgeoning record in this bankruptcy case includes an extraordinary number of unresolved contradictions, apparent obfuscations and unanswered allegations of fraud amounting to criminal conduct by and against both parties. Difficult as it is to piece together a coherent tale from the record, traces of serious misconduct appear, although doubt surrounds who is responsible. Nevertheless, for purposes of this appeal, we need dispose of only two comparatively narrow questions: (i) whether the original appeal from the bankruptcy court was properly before the district court despite the fact that the attorney who filed and perfected it had not been authorized to do so; and (ii) whether the federal courts have jurisdiction over a Chapter 11 petition filed by a corporation previously dissolved by New York State for nonpayment of franchise and taxes. Because we answer these questions in the affirmative, we conclude that the bankruptcy court did not err in granting summary judgment nullifying the post-petition transfer of substantially all the assets of Cedar Tide Corporation ("Cedar Tide"), a Chapter 11 debtor-in-possession, to Chandler's Cove Inn, Ltd. ("CCI") where the transfer was made without notice and a hearing as required by 11

U.S.C. SS 363(b)(1) (1982 & Supp. IV 1986).

BACKGROUND

We note at the outset that the record in this appeal contains serious lacunae, some of which may reflect grave improprieties. Nevertheless, the record is sufficient to allow us to resolve the merits of the appeal.

The underlying dispute concerns forty largely undeveloped waterfront acres in Suffolk County, New York ("the Land"). The Land, which is apparently worth at least one and perhaps as much as six million dollars, has been been owned, directly or indirectly, for about fifty years by Elizabeth Chandler, now approximately ninety years old. From 1969 onward, the record owner of the Land was Cedar Tide, a corporation formed in that year with the Land as its main, if not sole, asset. Although Cedar Tide's stock may never have been issued, it apparently was intended that Elizabeth would be the majority stockholder and her son Frederick the minority stockholder. At least we know of nothing indicating that anyone else has an ownership interest. Cedar Tide was dissolved by New York State in December 1979 for nonpayment of franchise taxes.

At some point, Cedar Tide borrowed money from The Mint Factors, Inc. with the Land as security. The loan terms were disputed in a state court action in which a stipulation of settlement was entered in 1983. In 1984, The Mint Factors brought a state court action against Cedar Tide and Elizabeth Chandler to enforce the settlement, and, in the alternative, to foreclose on the Land. In an opinion dated October 11, 1985, the state court ruled that The Mint Factors was entitled to specific performance of the stipulated settlement. However, the state court judgment appears never to have been carried out. In the wake of this attempt by The Mint Factors to foreclose on the Land, Cedar Tide filed for reorganization under Chapter II on December 10, 1985.

Frederick Chandler authorized the December 1985 Chapter 11 filing, alleging that he was a director and fifty percent shareholder of Cedar Tide Corporation, and that he had been authorized to file the petition. Frederick's claim of fifty percent ownership contradicted testimony given in the state court in August 1985 by Elizabeth, who testified that there were 200 shares in Cedar Tide outstanding and that she owned 125 and her son Frederick owned 75. The filing did not mention the dissolution of Cedar Tide. Harold Spivack, the attorney who

filed the petition, attests that he did not know that the corporation had been dissolved at the time of filing, and that he discovered this fact only at the end of January 1986. After the Chapter 11 filing, Cedar Tide paid its back taxes under an amnesty program. The corporation received an official notice of reinstatement in February 1986 and appears to have been formally reinstated no later than May 1986.

CCI, the other claimant to the Land in the present proceeding, did not file its certificate of incorporation until January 3, 1986, some weeks after Cedar Tide's Chapter 11 filing. A series of transactions followed that incorporation. On January 18, 1986, Elizabeth transferred all of her interest in Cedar Tide and the Land to Frederick. On March 24, 1986, Stanley Kommisar, as vice-president of Cedar Tide, executed a deed transferring the Land to CCI. This may have been a cameo performance because Kommisar is otherwise unknown. Sidney Mintz, an attorney, witnessed the deed and apparently took possession of the corporate records of both Cedar Tide and CCI. A Charlotte Mintz is a principal of The Mint Factors, but whether she is related to Sidney is not reflected in the record. The deed was registered with the Suffolk County Clerk on March 27, 1986.

On April 16, 1986, Elizabeth Chandler and Cedar Tide filed an action in New York State

court seeking to set aside the deed transferring the Land to CCI. In alleging that she was the sole shareholder in Cedar Tide, she failed to mention the transfer of all of her interest to Frederick in January or her earlier testimony that Frederick was either a minority or fifty percent shareholder. The complaint also neglected to mention the fact that Cedar Tide already had Chapter 11 petition pending in the bankruptcy court. Mintz appeared for CCI. On May 22, 1986, while its state court action was still pending, Cedar Tide filed an adversary proceeding in bankruptcy court seeking to set aside the March 24, 1986 deed transferring the property to CCI. Judge Goetz issued a temporary restraining order enjoining CCI from transferring the property on May 23, 1986. CCI, represented by attorney Douglas A. Durnin, moved to dismiss the adversary proceeding on the grounds that: (1) the bankruptcy court lacked jurisdiction because CedarTide was a dissolved corporation when it filed Chapter 11; (2) Cedar Tide lacked authority to bring the action because it was controlled by CCI, which possessed seventy-five percent of its stock; (3) Cedar Tide's filings were insufficient as a matter of law; and (4) the pending state action precluded any transfer of the property in any event, so no injunction would lie.

The bankruptcy court held a hearing on Cedar Tide's motion for a preliminary injunction

and CCI's motion to dismiss on June 4, 1986. No one at the hearing had access to the corporate records of either Cedar Tide or CCI, which apparently were in the possession of Sidney Mintz. Robert S. Arbeit, Cedar Tide's counsel, admitted that he did not know exactly what was going on (a refreshing touch of candor in a record shrouded in deliberate or negligent obfuscation), including what Frederick's interest was, but he indicated that Frederick and Elizabeth were willing to swear that they had not transferred the Land to anyone or authorized its transfer (although the complaint alleged lack of authority only upon "information and belief"). Durnin appeared for CCI, and indicated that Shari Scott, a second-grade school teacher and part-time real estate broker, was a seventy-five percent owner of CCI. Frederick apparently was the owner of the remaining twenty-five percent interest in the company and its agent for service of process. Shari's husband Paul Scott and her adult daughter Susan Scott Fortuna were also somehow involved with the company. Durnin indicated that he believed that Frederick was the sole owner of Cedar Tide and had authorized the transfer of the Land to CCI. He did not dispute that Cedar Tide was in Chapter II when the transfer took place or that Cedar Tide continued as debtor-in-possession at that time. He claimed that Frederick received consideration for the transfer but produced only

an unsigned memorandum between Frederick and Shari Scott. Judge Goetz granted the injunction and denied CCI's motion to dismiss on the grounds that a dissolved New York corporation may seek Chapter 11 protection. [1]

Cedar Tide moved for summary judgment on September 9, 1986. On September 26, 1986, while that motion was pending before Judge Goetz, CCI, whose sole asset appears to have been its claim to the Land, filed a voluntary Chapter 7 petition in the United States Bankruptcy Court in the Southern District of New York. The case was assigned to Judge Buschman, who appointed Isaac Nutovic interim trustee for CCI. On September 30, 1986, Cedar Tide's motion for summary judgment was argued before Judge Goetz, and Durnin appeared for CCI. After that hearing, Judge Goetz granted summary judgment for Cedar Tide. That judgment was entered on October 16, 1986. Durnin filed a notice of appeal on October 26, 1986. Durnin claims not to have known of CCI's filing of the Chapter 7 petition at the time he filed the notice of appeal and claims to have discovered this fact only after he received a

---

[1] Judge Goetz also noted that the motion to dismiss was not properly before her inasmuch as it was directed at the petition itself, but failed to indicate that there had been notice to creditors as required under the bankruptcy code. Bankr. R. 2002(a).

creditor's notice. Nevertheless, he perfected the appeal in March 1987.

CCI's Chapter 7 case was transferred from the Southern District to Judge Goetz in the Eastern District in December 1986. On January 6, 1987 Robert L. Pryor was appointed to replace Nutovic as interim trustee. Neither he nor Nutovic ever filed or authorized the filing of an appeal from Judge Goetz's grant of summary judgment, although Pryor did request by letter an extension of the date scheduled for oral argument in the district court so that he could inform himself about the case. While later statements by Pryor indicate that he never believed that the appeal had merit, he did nothing to stop Durnin from perfecting it. Meanwhile, it appears that Pryor's efforts to learn the underlying facts were stymied by CCI's purported principals. Mintz refused to cooperate with him, and the Scotts were unforthcoming to say the least. CCI repeatedly petitioned the bankruptcy court for Pryor's removal. At one point Pryor spoke to Lisa Scott, Paul and Shari's 13-year old daughter, on the phone, in an effort to locate Susan Scott Fortuna, who had been designated to provide corporate information. After this ten-minute phone call, Lisa quickly got into the spirit of things and filed a $10,000,000 suit against Pryor in state court for intentional infliction of emotional distress.

Pryor answered and counterclaimed and then removed the suit to the bankruptcy court.

On April 24, 1987, while Durnin's appeal was pending, CCI converted its case to a Chapter 11. Pryor was automatically discharged. Paul Scott, on behalf of CCI, then moved for a nunc pro tunc retention order for Durnin. In a Memorandum Decision and Order dated May 28, 1987, Judge Goetz denied the petition. In the meantime, on May 12, 1987, Mintz had been authorized to act as general counsel for CCI and moved in the bankruptcy court to reargue the denial of Durnin's appointment. [2]

According to Mintz and the docket sheet for CCI's case in the bankruptcy court (which is not a part of the record on appeal), the motion to reargue the denial of the nunc pro tunc retention of Durnin was granted by Judge Goetz, and on June 22, 1987, Judge Goetz reversed herself and authorized Durnin's retention. Judge Goetz ordered CCI to submit an order to that effect. According to Mintz, the order was submitted on June 29, 1987.

---

2. On June 19, 1987, Mintz also filed a motion before Judge Weinstein seeking, inter alia, to extend the time for perfecting the appeal six months. He failed to appear at the hearing held on his motion, which was ultimately denied by Judge Weinstein.

On that day, however, the docket sheet indicates that Judge Goetz withdrew from all matters relating to Cedar Tide and CCI. The case was then transferred to Judge Holland, who already had been assigned to other matters relating to the two debtors. Durnin attests that on July 14, 1987, he was informed over the telephone by one "Shafferman" in the bankruptcy court that the retention order had been signed by Judge Holland the previous day. Judge Holland, however, never signed the retention order. Durnin argued the appeal before then Chief Judge Weinstein on July 15, 1987. Judge Weinstein dismissed the appeal without opinion "on procedural grounds and on the merits" on August 6, 1987. A transcript of the hearing before him is not part of the record on appeal.

DISCUSSION

A. The District Court's Dismissal on Procedural Grounds

Because Judge Weinstein dismissed the appeal both "on procedural grounds and on the merits," the threshold question is whether the appeal was properly before the district court. As with everything else in this case, the resolution of this depends upon the unraveling of a web of procedural and substantive irregularities and omissions.

The notice of appeal to the district court in this case was filed and perfected by an attorney, Durnin, who had not been authorized to do so by the interim Chapter 7 trustee who has full authority to represent the estate and in whom all of the bankrupt's claims had vested. See 4 Collier on Bankruptcy SS 541.02 at 541-15 (L. King ed. 15th ed. 1988); cf. In re Teltronics Servs., 762 F.2d 185, 189 (2d Cir. 1985) (vesting in trustee of all claims of a corporate bankrupt elementary" under old Bankruptcy Act). Durnin claims not to have known that his pre-petition client was in bankruptcy. He also claims that he did not seek prior court approval to perfect the appeal after he learned of the existence of the Chapter 7 filing because he did not know that such permission was required. However, Pryor, the interim Chapter 7 trustee for CCI after the case was transferred to the Eastern District, was aware of the existence of the appeal and even requested a 45-day extension of the date of argument so that he might investigate its merit. It is clear, then, that Pryor never repudiated Durnin's appeal, and appears to have at least acquiesced in it prior to his automatic dismissal upon conversion of the case to Chapter 11. His acquiescence is significant. Cf. In re Martin-Trigona, 760 F.2d 1334, 1341 (2d Cir. 1985) (even if person who filed voluntary

Chapter 11 petition had no authority to do so, corporation and its principal who acquiesced and ratified act by their ongoing participation in proceedings bound by act). After CCI's petition was converted to Chapter 11, CCI as debtor-in-possession repeatedly moved for a nunc pro tunc order approving Durnin's retention as special counsel so that he might argue the appeal. While Judge Goetz initially denied CCI's motion, she apparently changed her mind just prior to recusing herself from the case and ordered CCI to submit an order authorizing Durnin's nunc pro tunc retention. Unfortunately, the order Judge Goetz asked CCI to submit was never signed by Judge Holland. Nevertheless, Durnin did argue the appeal before Judge Weinstein, who reached the merits. In these highly unusual (and hopefully not to be repeated) circumstances, we think that Pryor's acquiescence in the pendency of the appeal, the eagerness of CCI to have Durnin argue the appeal, Judge Goetz's docketed decision to grant a nunc pro tunc special retention order, and Judge Weinstein's dismissal of it on the merits as well as upon procedural grounds all support the conclusion that we should reach the merits of the case. Cf. Brown v. General Motors Corp., 722 F.2d 1009, 1011 (2d Cir. 1983) (reluctantly reaching merits of discharged attorney's claim on his own behalf that he was entitled to fees under the Civil Rights Attorney's Fees Awards

Act despite fact that attorney lacked standing because matter outside record indicated that party to the action had consented to claim and the district court had reached merits); Oguachuba v. I.N.S., 706 F.2d 93, 97-98 (2d Cir. 1983) (reaching merits where original application for attorney's fees under Equal Access to Justice Act was filed by attorney without standing but district court had reached merits and party to action had filed notice of appeal to the court of appeals).

B. Jurisdiction Over a Dissolved Corporation

In the hearing on Cedar Tide's motion for a preliminary injunction and in its papers before Judge Weinstein and before us, CCI has argued that Cedar Tide's bankruptcy petition and the adversary proceeding brought against CCI must be dismissed because the bankruptcy court lacked subject matter jurisdiction [3] over a corporation dissolved by New York State for failure to pay taxes. According to CCI, a dissolved corporation is not an entity which may seek reorganization under Chapter 11. We

---

3. As we noted in In re Martin-Trigona, 760 F.2d at 1340, such an attack is more properly described as directed against the personal, rather than subject matter, jurisdiction of the bankruptcy court.

disagree. [4]

Under New York Tax Law SS 203-a(3) (McKinney 1986), the secretary of state may dissolve a corporation by proclamation for failure to pay corporate franchise taxes. Under New York Business Corporation Law SS 1006(a) (McKinney 1986),

> [a] dissolved corporation . . . may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place . . . in particular . . . [t]he corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative,

---

4. Cedar Tide claims CCI's jurisdictional argument is not properly before the court because CCI never appealed Judge Goetz's denial of their motion to dismiss. A denial of a motion to dismiss on jurisdictional grounds is not, however, normally appealable prior to the entry of final judgment, see in re United States Catholic Conference, 824 F.2d 156, 164 (2d Cir. 1987), rev'd on other grounds, 108 S. Ct. 2268 (1988) (citing Catlin v. United States, 324 U.S. 229, 233, (1945)), and under the circumstances of this case, we do not think that the bankruptcy court's inclusion of the denial of the motion to dismiss in the same order that granted the preliminary injunction imposed upon CCI the duty immediately to appeal the denial or waive the argument.

In a separate motion, CCI has asked us to certify to the New York courts the question of whether a New York corporation dissolved for non-payment of taxes may file a petition for reorganization under Chapter 11. In light of our decision in In re Martin Trigona, 760 F.2d 1334, discussed infra, we see no need to certify the question.

arbitrative or otherwise, in its corporate name, and process may be served by or upon it.

Under New York Tax Law SS 203-a(7) a dissolved corporation will be reinstated nunc pro tunc upon the filing with the department of state a certificate that all franchise taxes, penalties and interest charges have been paid and the payment of a fee to the secretary of state.

There is no case law that clearly disposes of the question whether a New York corporation dissolved for nonpayment of taxes may file a petition for reorganization under Chapter 11. Matter of Luftek, Inc., 6 Bankr. 539 (B. Ct. E.D.N.Y. 1980) held that a dissolved corporation may be a debtor under Chapter 7. However, the Luftek court based its conclusion upon its belief that "bankruptcy liquidation is not inconsistent with continued existence under section 1006 of the [Business Corporation Law] for purposes of winding up the affairs of the corporation." 6 Bankr. at 542 n.3 (emphasis added). Neither Luftek nor the cases it relied on addressed the question of jurisdiction where the dissolved corporation seeks reorganization under Chapter 11 rather than liquidation under Chapter 7. Nor do the New York state cases cited by the parties provide a definite answer. It is true that language in Independent Investor Protective League v. Time, Inc., 50 N.Y.2d 259, 263, 428

N.Y.S.2d 671, 673, 406 N.E.2d 486, 488 (1980), to the effect that "a corporation continues to exist as a legal entity after dissolution in New York, at least for the purposes of actions and proceedings," provides some support for a finding of federal jurisdiction, but this language does not inexorably lead to the conclusion that "actions and proceedings" include reorganization under Chapter 11.

However, in In re Martin-Trigona, 760 F.2d 1334, 1342-43, we addressed the question of whether a Connecticut corporation dissolved by the secretary of state by forfeiture could file for Chapter 11 protection. The Connecticut statutory scheme with regard to dissolved corporations in Connecticut General Statutes SS 33-375-379, 33-387 and 33-388 (1987) is very similar to New York's. Under Connecticut law, once the secretary of state has dissolved a corporation "by forfeiture" by filing a certificate of dissolution by forfeiture pursuant to Connecticut General Statute SS 33-387, the corporation may either seek reinstatement or proceed with winding up its affairs. See Conn. Gen. Stat. SS 33-388, 33-379; see also In re Martin-Trigona, 760 F.2d at 1342. After dissolution, the corporation may still sue or be sued, Conn. Gen. Stat. SS 33-379, and within three years after dissolution by forfeiture, reinstatement is automatically effective nunc pro

tunc if the corporation files a certificate of reinstatement accompanied by certain payments and documents. Conn. Gen. Stat. SS 33-388(a), (e).

In In re Martin-Trigona, we carefully reviewed the Connecticut statutory scheme and found nothing that prevented a dissolved corporation from seeking "the added protections of the federal bankruptcy code" rather than winding up its corporate affairs under state law. In re Martin-Trigona, 760 F.2d at 1342. Indeed, we concluded that "deny[ing the dissolved corporation] the benefits of reorganization or liquidation under the federal bankruptcy law would be contrary to the central purpose of the federal code." Id. We then explicitly held that "the filing by the Secretary of State of a certificate of forfeiture which effected a dissolution of the debtor corporation . . . did not deprive the bankruptcy court of jurisdiction over the voluntary Chapter 11 reorganization proceeding filed" four months after the dissolution. Id. at 1342-43. Given the fact that New York's statutory scheme is substantially similar to Connecticut's (and even arguably less restrictive in that it does not require a dissolved corporation to seek reinstatement within three years), CCI's claim that the bankruptcy court lacked jurisdiction was properly rejected by the bankruptcy court.

C. The Merits

Not surprisingly, neither Cedar Tide's nor CCI's filings on the motion for summary judgment fully complied with Fed. R. Civ. P. 56 or Rule 22 of the Local Rules of the Bankruptcy Court for the Eastern District of New York. Nevertheless, the bankruptcy court and the district court apparently were satisfied that the factual elements of Cedar Tide's claims were established solely through reference to the bankruptcy court's own docket sheet and by admissions of CCI's counsel. So are we, and we conclude that the bankruptcy court did not err in granting summary judgment for Cedar Tide.

Section 363(b)(1) prohibits the use, sale or leasing of property of the estate out of the ordinary course of business without notice and a hearing. 11 U.S.C. SS 363(b)(1)(1982 & Supp. IV 1986). In practice, the factual issues that a bankruptcy court must consider in ruling on a summary judgment motion under section 363(b) are few: whethe the property in question was "property of the estate" under section 541; and whether the transfer in question was "in the ordinary course of business." Here, it is undisputed that the deed was executed after the filing of the petition and without notice and a

hearing. Although CCI argues that the property was not property of the estate subject to section 363(b)(1), it is undisputed that title to the property resided in Cedar Tide at the time of the filing (if it did not, CCI's deed would be meaningless is in any event), and as such the property was estate propert under 11 U.S.C. SS 541(a)(1) (1982 & Supp. IV 1986). Indeed, CCI does not dispute that it did not even exist at the time Cedar Tide filed its Chapter 11 petition. The Land could hardly, at the time of Cedar Tide's filing, have been property of a non-existent corporation.

Moreover, even if CCI had existed at the time of the filing, section 363 would not authorize the transfer in question. Clearly, the sale of all or substantially all of a debtor's assets implicates the full range of procedures provided for by the Code. The process of reorganization cannot be evaded by labeling a sale as being "in the ordinary course of business." Cf. In re First Int'l Servs. Corp., 25 Bankr. 66 (B. Ct. D. Conn. 1982); In re the White Motor Credit Corp., 14 Bankr. 584 (B. Ct. N.D. Ohio 1981). We do not, of course, mean to imply that challenges to the propriety of a Chapter 11 filing can never be raised. We hold only that such challenges may not be raised as affirmative defenses to the avoidance of a transfer of estate property. As a practical matter, bankruptcy

courts must be able to assemble the property of a given estate in comparatively summary fashion, disposing of a minimum of factual and legal disputes. Avoidance of transfers constitutes less an adjudication of rights than an assertion of jurisdiction over the property in question. Thus, CCI's various charges against Cedar Tide and claims of right (along with its demand for a jury trial) had no place on the motion for summary judgment before Judge Goetz.

CONCLUSION

The present matter appears to be only the tip of the iceberg, with numerous other appeals percolating up from the bankruptcy court. We have already noted the impression created by the record that serious misconduct by someone has occurred. We also note that we have on other occasions imposed sanctions on litigants who abuse the protection of the bankruptcy courts. See e.g. In re Cosmopolitan Aviation Corp., 763 F.2d 507, 517 (2d Cir.), cert. denied sub nom. Rothman v. N.Y. State Dep't of Transp., 474 U.S. 1032 (1985). In view of the unresolved allegations of criminal conduct, we believe this entire matter ought to be reviewed by the appropriate authority to decide what, if any, action should be taken. With that in mind, the Clerk is directed to serve a copy of this decision

on the Honorable Andrew J. Maloney, United States Attorney for the Eastern District of New York.

The judgment of the district court is affirmed on the merits.

710-10-19-88 USCA-80004 FY89
RECORD PRESS, INC., 157 Chambers St., N.Y. 10007 (212) 619-4949

(Order denying petition for rehearing)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st day of December one thousand nine hundred and eighty-eight.

IN RE:

CEDAR TIDE CORP.,

Debtor

CEDAR TIDE CORP.,

Plaintiff-appellee,

-V-

CHANDLER'S COVE INN LTD.,

Defendant-appellant

A petition for rehearing containing a suggestion that the action be reheard in banc

having been filed herein by counsel for the Defendant-Appellant, Chandler's Cove Inn, Ltd.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

By:
Fred M. Cassidy,
Chief Deputy Clerk.